FARAD CONTINUATION SHEET No.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

APPEAL FROM ORDER NO. 678 OF 2004.

Office Notes,Office Memoranda of Coram, appearnaces,Courts's orders or directions and Registrar's orders.	Court's or Judge's orders

Shri Navin Parekh with Shri A.M.Saraogi for the appellant.
Shri V.M.Thorat i/b R.N. Kachare for respondent No.1.
Shri Y.M. Chaudhari for respondent No.2.
Shri K.K. Tated, AGP for respondent No.4

CORAM: V.C.DAGA,J.
DATED: 12-08-2004.

P.C.:
. Heard learned Counsel for rival parties.

2. Perused appeal memo with documents annexed thereto.

3. This appeal is directed against the order dated 14.7.2004 passed by the City Civil Court, Bombay, in L.C.Suit No.2586 of 2004, whereby the trial Court refused to grant ad-interim relief preventing demolition of the building or flats occupied by the appellants- original plaintiffs and directing defendant Nos.1 and 2 to provide transit alternate

accommodation to the appellants-plaintiffs at the site itself within one week from the date of the impugned order.

4. The trial Court also further clarified that if plaintiffs did not agree to have transit alternate accommodation on site, in that event, each of them in lieu thereof shall be entitled to have Rs. 1,85,000/- from defendant Nos. 1 and 2 within 48 hours from the date of order subject to the appellants- plaintiffs indicating their written willingness to accept the said sum of Rs. 1,85,000/-. In addition to this, defendant No.2 was also directed to pay Rs. 25,000/- to each of the plaintiffs to meet their house shifting expenses.

The Facts;

5. The appellants are in use, occupation and possession of their respective residential residential flats situate in a building state known as Bandra Prajakta Co-operative Housing Society Ltd. situate

at 13/671, Notice Kher Nagar, Bandra (East), Mumbai- 400 051 (‘the society’ for short).

6. The respondent No.1-Society has submitted a proposal to the Housing Board for reconstruction of the building, after obtaining consent of not less than 70% of occupiers of the building. No Objection Certificate for construction of the said building has also been issued by the Board to the respondent No.1- Society.

7. The appellants are objecting to the decision of the respondent No.1- Society to reconstruct building in question and are alleging collusion between the builder and the office bearers of the society. They are also alleging that consent decree of eviction against other occupants was obtained by playing fraud on the City Civil Court, Mumbai.

8. Appellants further submit that though they were shown as parties to the suit, their consent was not obtained. They were

kept away from the suit proceedings and compromise decree was obtained behind their back as such the said decree is not binding on them.

9. Appellants submit that no plans have been approved for construction of the new premises/building to accommodate 54 occupiers of the building. The approved plans indicate approval of 32 tenements only, that too, with much less area. The appellants therefore, apprehend that after demolition of building they may not be put in possession of reconstructed flats. They submit that they are neither party to the resolution of the society nor they are party to the compromise decree, hence their possession in law cannot be disturbed. Appellants allege that despite this settled legal position, their possession is being disturbed by demolishing entire building where appellants are residing, hence they had no option but to file instant suit and pray for interim injunction to restrain demolition of the building and consequent

dispossession of the appellants from the suit building.

10. Shri V.A. thorat, learned Advocate General appearing for respondent Nos. 1 and 2 submitted that the respondent No.1 is ready identify the flats to be given to the appellants and ready to give an undertaking to this Court that appellants would be provided flats before other flats are handed over to the other occupiers, so as to take care of illconceived apprehension in the mind of the appellants.

11. Shri Thorat further submitted that even if appellants are not party to the compromise decree, still they can be summarily evicted by MHADA by resorting to the provisions of section 95-A of the MHADA Act. In his submission, impugned order of the trial Court is more favourable to plaintiffs-appellants. The trial Court has passed an equitable order to protect the interest of the appellants. He submits that, if MHADA decides to

invoke section 95-A of the Act, then appellants shall have no protection or benefit as provided by the trial Court in the impugned order.

12. Shri Thorat further submits that the respondents have followed all legal provisions and complied with the legal requirements before initiating any action of demolition. It is further submitted that other flat occupants, who are party to the compromise decree are not challenging it. Appellants, who are 5 in number, are the only persons who are withholding entire development project without any reasonable cause.

13. Shri Thorat thus submits that the appeal is liable to be dismissed being devoid of any substance.

Consideration:

14. Having heard rival parties and having examined impugned order, at the outset, it is necessary to mention that the appeal as

stated hereinabove is directed against the order refusing to grant ad-interim relief. Notice of Motion is pending for final hearing before the trial Court. Since Notice of Motion is still pending before trial Court it would not be proper on the part of this Court to adjudicate upon the issues relating to merits of the Motion in question. The limited issue which this Court is expected to address is as to whether or not the order of the trial Court refusing to grant ad-interim relief is proper.

15. If one turns to provision of section 95-A and sub-clause (1) of the Maharashtra Housing and Area Development Act, 1976, it contemplates, where the owner of a building or the members of the proposed co-operative housing society or the occupiers of such building submits a proposal for reconstruction of the building, after obtaining written consent of not less than 70 per cent of the total occupiers of that building along with No Objection Certificate for such

reconstruction of the building issued by the Board to the owner or to the proposed co-operative housing society of the occupiers, as the case may be, then it shall be binding on all the occupiers to vacate the premises.

15. Proviso to sub-section (1) of section 95A of the Act makes it incumbent upon the holder of such No Objection Certificate to make available to all occupiers of such building alternate temporary accommodation. Sub-clause (2) of section 95A stipulates that on refusal by any of the occupants as provided in sub-clause (1) on being approached by the by the holder of such No Objection Certificate for eviction of such occupiers, it would be competent for the Board, notwithstanding anything contained in Chapters VI and VII, to effect summary eviction of such occupiers. Sub-clause (4) provides that any person who refuses to vacate such premises or obstructs eviction shall, on conviction, be punished with imprisonment for a term which may

extend to one year or with fine which may extend to five thousand rupees, or with both. It is thus clear that consent of all occupiers of the building is not at all necessary. Even in the absence of consent of remaining 30 per cent occupiers of the building, they can very well, be directed to vacate the premises.

16. It is thus clear that even in absence of consent of the plaintiffs to vacate their flats, the Board has authority to evict them by resorting to section 95A of the Act.

17. On being asked, Shri Tated, learned AGP for respondent No.4-MHADA submitted that whenever action under section 95A is resorted to, notice of 24 hours or 48 hours is normally given to the occupiers for vacating the premises. He reiterated that consent of all occupiers is not at all necessary, if 70% of them have given their consent for reconstruction of the building. It is thus clear that if MHADA decides to invoke provisions of section

95A, the plaintiffs may not even get more than 24 or 48 hours to vacate the premises. In that event, they may not even get transit accommodation of their choice with financial help.

18. Considering the aforesaid provision, the trial Court, while refusing to grant ad-interim injunction passed balanced order, taking into account the interest of the plaintiffs,. Options is given to the plaintiffs that if they do not desire to shift to alternate transit accommodation, even then plaintiffs can receive Rs. 1,85,000/- from defendant No.1 to have the accommodation of their choice along with Rs.25,000/- to meet expenses for shifting from the suit premises.

19. In this view of the order, trial Court has taken care of the interest of the plaintiffs. If MHADA is allowed to take action under section 95-A, in that event, plaintiffs would not be entitled to receive Rs. 1,85,000/- along with Rs.25,000/- towards shifting expenses as

awarded by the trial Court in the impugned order. The occupants, who are parties to the compromise decree are not alleging any fraud having been played on them or on the Court passing compromise decree. They are ready to abide by the compromise decree as such appellants are nobody to allege that decree obtained by respondent No. 1 is fraudulent. The appellants, merely on the ground that they are not parties to the compromise decree, cannot stall action of their eviction. In the event of eviction action under section 95-A of the MHADA Act, the plaintiffs may not get transit accommodation of their choice with financial assistance to shift.

20. In the above view of the matter, taking overall view of the matter, I do not see any case is made out by the appellants to interfere with the impugned order. The discretion exercised by the trial Court is legal and reasonable. In the case of U.P.Co-operative Federation vs. Sunder Bros. Delhi, AIR 1967 SC 249,the Supreme Court has held thus :

" In dealing with the matter raised before it at the appellate stage, the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court in that in exercising its discretion the trial Court has acted reasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion."

Appeal is, thus, dismissed with no order as to costs. The trial Court is directed to decide Notice of Motion in accordance with law on its own merits taking into account refusal on the part of the appellants to accept monetary assistance indicated by the trial Court.

18. At this stage, Shri Parekh, learned Counsel for the appellants prayed for stay of this order. Respondents opposed this prayer. This Court indicated in

unequivocal terms to the appellants that stay or injunction can be granted subject to the appellants filing usual undertaking to vacate in the event they are not successful before the higher Court in obtaining relief. Shri Parekh, after taking instructions from the appellants, who are present in Court, declined to furnish undertaking as sought. In this view of the matter prayer for stay is rejected.